BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAN BOWLES, II	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,041
HEROES SPORTS BAR	)	
Respondent	)	
AND	)	
	)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 18, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was denied benefits after the ALJ determined that claimant had failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Gary K. Albin of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held February 16, 2010, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Claimant alleges that he left his post as a security employee/bouncer for respondent to go to the assistance of a patron of respondent who was being accosted by several persons in front of a different club identified as Indigo. During the fight, claimant was knifed and suffered serious injuries which required admission to the hospital. Claimant contends that this action was allowed as he was responsible for the safety of respondent's patrons both inside and outside the bar.

Respondent contends that claimant left his post and his employment and became involved in a fight in front of another drinking establishment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a part-time bouncer for respondent with the title of assistant head of security. Claimant worked at the doors of the establishment, checking IDs and also assisted in ensuring the safety of the patrons in respondent's bar. On Friday night, December 18, 2009, claimant was working at the outside gate to respondent's establishment. At some point, after midnight, on Saturday, December 19, 2009, a fight broke out across the street at another establishment identified as Indigo. Claimant left his post at the gate to respondent's bar and ran across the sidewalk and street and onto the sidewalk at Indigo. There, a group of individuals were attacking a person identified as Alex. Claimant stated that Alex was a patron of respondent's bar and had just recently left the bar to go across the street. When Alex was attacked, claimant went to Alex's aid and suffered the injury. Claimant was the only bouncer working for respondent who went to the aid of Alex. Additionally, on a security video showing respondent's outside gate, claimant was unable to identify Alex as having recently left respondent's establishment. Additionally, claimant did not know Alex's last name and acknowledged that Alex was only an acquaintance and not a friend. It is noted that after claimant suffered the injuries, another bouncer for respondent came to claimant's assistance.

The record contains testimony regarding the responsibilities of the security staff with respondent. Claimant contends that he was doing his job when he ran across the street to intervene in the fight, as it was his responsibility to aid patrons of respondent when they are attacked by a gang of individuals. Respondent contends that the duty to protect patrons is limited to respondent's establishment and does not extend across the street to a separate business. Therefore, claimant abandoned his job when he ran across to the Indigo and involved himself in that fight.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

Claimant's job entailed security for respondent and its patrons. It did not cover activities at a separate establishment. Here, claimant left his post for respondent and went to an altercation at a different bar. While claimant contends he was attempting to protect a former patron of respondent, he was unable to identify that person on the security video.

> In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.[5]

Here, claimant left his job with respondent. The deviation was substantial. He was the only security person working for respondent to do so. There is insufficient evidence in this record to support claimant's contention that he was attempting to protect a patron of

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2009 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 284, 899 P.2d 1058 (1995).

respondent. This Board Member finds that claimant abandoned his employment with respondent and involved himself in an incident connected with a separate establishment. Thus, the injuries suffered to claimant did not arise out of and in the course of his employment with respondent. The denial of benefits by the ALJ under the Kansas Workers Compensation Act is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove by a preponderance of the credible evidence that he suffered an accidental injury which arose out of and in the course of his employment with respondent. The denial of benefits is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 18, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

HONORABLE GARY M. KORTE

c: Gary K. Albin, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[6] K.S.A. 44-534a.